

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7475

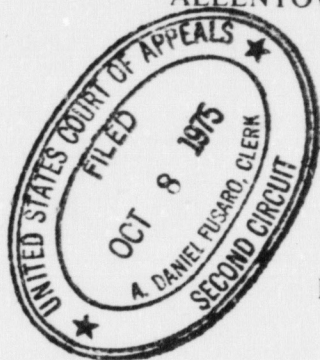
In The
United States Court of Appeals

For The Second Circuit

ORIGINAL

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff-Appellee.



vs.

E. RENE FRANK,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

BERNARD HIRSCHHORN

Attorney for Defendant-Appellant

108-18 Queens Boulevard

Forest Hills, New York 11375

(212) 793-5040

(8750)

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J.
(201) 257-6850

New York, N.Y.
(212) 563-2121

Philadelphia, Pa.
(215) 563-5587

Washington, D.C.
(201) 783-7288

TABLE OF CONTENTS

	Page
THE ISSUES.....	1
PRELIMINARY STATEMENT.....	2
STATEMENT OF FACTS	3
POINT ONE - APPELLANT'S CONSTITUTION RIGHTS SECURED BY THE FOURTEENTH AMEND- MENT WERE VIOLATED BY INADEQUATE EIGHT DAY NOTICE OF MOTION FOR A DEFAULT JUDGMENT SERVED UPON HIM BY REGULAR MAIL DIRECTED TO HIS ADDRESS IN SPAIN, AND WHICH HE DID NOT RECEIVE IN TIME TO PREPARE A DEFENSE	12
POINT TWO - APPELLANT HAS A MERITORIOUS DEFENSE TO THE ACTION BY APPELLEE AND THE COURT BELOW SHOULD HAVE VACATED THE JUDGMENT ENTERED BY DEFAULT	19
POINT THREE - APPELLANT'S CONSTITUTIONAL RIGHTS SECURED BY THE FOURTEENTH AMENDMENT WERE VIOLATED BY INADEQUATE NOTICE OF DEPOSITION AND ORDER TO TAKE DEPOSITION SERVED BY REGULAR MAIL AT HIS ADDRESS IN SPAIN, AND WHICH HE DID NOT RECEIVE IN TIME TO PREPARE A DEFENSE	23
POINT FOUR - DUE PROCESS OF LAW IS VIOLATED BY ORDERING A PARTY TO TRAVEL FROM SPAIN TO NEW YORK FOR A DEPOSITION WITHOUT TENDERING TRAVEL EXPENSES TO HIM....	25
CONCLUSION - THE ORDERS OF THE COURT BELOW SHOULD BE REVERSED AND THE JUDGMENT ENTERED	

AGAINST APPELLANT BY DEFAULT	
BE REVERSED.....	28

TABLE OF AUTHORITIES

<u>CASES-</u>	Page
Armstrong V. Manzo, 380 U.S. 545, 85 S.Ct 1187, 14 L.Ed. 2d 62 (1965)	14, 25
Desmond V. Hachey, 315 F. Supp. 328 (D.C., Me., (1970)	14, 25
Gomes V. Williams, 420 F. 2d 1364 (10th Cir., 1970)	23
Schroeder V. City of New York, 371 U.S. 203, 83 S.Ct. 279, 9 L.Ed. 2d 255 (1962) .	14, 25
Securities & Exchange Commission V. Vogel, 49 F.R.D. 297 (D.C.S.D.N.Y., 1969) .	23
United States ex rel Mercer V. Kelly, 50 F.R.D. 150 (D.C.E.D. Pa., 1970)	22
Wallace V. DeWard, 47 F.R.D. 4 (D.C., Virgin Islands, 1969)	23
<u>STATUTES AND OTHER AUTHORITIES</u>	
Fourteenth Amendment	1, 12, 14
28 U.S.C. 1783	26, 27
Rule 30 (a), Federal Rules of Civil Procedure	27
Rule 31, Federal Rules of Civil Procedure....	23
Rule 55 (c), Federal Rules of Civil Procedure	17
Rule 60 (b), Federal Rules of Civil Procedure	17

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff-Appellee,

-against-

E. RENE FRANK,

Defendant-Appellant.

-----X

APPELLANT'S BRIEF

THE ISSUES

1. Is eight (8) days notice by regular mail to a party in Spain sufficient, by Fourteenth (14th) Amendment standards, to afford adequate notice of the relief his adversary is seeking?

2. Should a Judgment of Default be vacated on a showing of a reasonable excuse for not appearing and a meritorious defense to the action, the basis for which is not particularized by the adversary?

3. Is an adequate foundation made for an ultimate application to punish for contempt by an order served by regular mail in Spain requiring a party to appear for deposition in New York without tendering travel expenses?

PRELIMINARY STATEMENT

This ~~is~~ an appeal from orders entered on the 21st day of July, 1975, in the United States District Court for the Southern District of New York (Ward, J.), dismissing appellant's cross-motion to vacate the judgment by default entered against him on the 28th day of October, 1974 (P. A-8)* and granting appellee's motion to punish defendant for contempt, but only to the extent of requiring that he appear for a deposition, in aid of enforcement of the default judgment rendered against him, within sixty (60) days of the Court's decision and on five (5) days notice to appellee's attorneys of the date of his appearance. (P. A-9)

STATEMENT OF FACTS

This is an action by appellee against appellant, the basis therefore, being set forth in appellee's amended complaint, being diversity of citizenship. (P. A-10) The amended complaint recites "that effective May 1st, 1971 (appellee) was, and still is the owner of a certain office building, and the realty upon which the same is located, known as the 'Center Square Building', located at 11 North Seventh Street, City of Allentown, Commonwealth of Pennsyl-

*Page numbers refer to the joint Appendix

vania," and that prior thereto, appellant was a general partner in a firm that owned the building. (P. A-11)

Count One of the complaint charges that for the purpose of inducing appellee to purchase the building, appellant made false representations that he was an international consultant in real estate matters and expert at operating commercial property, that all the space in the building was either rented or leases were about to be executed for said space, that the building was operating profitably, that it was well maintained and in a good state of repair and that any necessary decoration would be done by appellant and that appellant would manage the building, pursuant to an agreement for five (5) years. (P. A-11/12) In reliance upon those representations appellee allegedly purchased the building for a total of \$1,100,000.00. As a result of their alleged falsity, appellee was damaged in the sum of \$350,000.00. (P. A-13/14)

The second cause of action charges that in connection with the purchase of the building, appellee entered into a management agreement and guaranty with appellant, requiring appellant to "make certain monthly payments to" appellee and to collect rent and pay expenses,

which allegedly was breached by appellant, causing appellee to sustain damages in the sum of \$350,000.00. (P. A-14/15)

The third cause of action charges appellant with wrongfully retaining possession of \$11,940.00 of rentals collected by him for appellee. (P. A-16/17)

The fourth cause of action charges appellant with failing to make good on a guarantee executed by him that the building would net at least \$70,000.00 per year, all to appellee's damage in the sum of \$351,465.00, taking into account a \$1,465.00 operating loss the first year and anticipation of losses thereafter. (P. A-18/19)

The amended answer denies the allegations of wrongdoing charged by appellee and in the first affirmative defense, refers to the provision of the contract providing:

"The purchaser represents to the seller that the purchaser has examined the premises and that the purchaser is fully satisfied with the physical condition thereof and that neither the seller nor any agent or representative of the seller has made any misrepresentation regarding the condition thereof, or tenancies affecting the same, or regarding any other matter or thing except as expressly set forth in this agreement and the schedule annexed hereto,"

and that none of the representations attributed to appellant by appellee are set forth in the contract. (P. A-21/23)

The second affirmative defense in the answer refers to paragraph "14" of the contract of sale, which provides as follows:

"The acceptance of a deed by the purchaser shall be deemed to be a full performance and discharge of every agreement and obligation on the part of the seller to be performed pursuant to the provisions of those, if any, which are herein specifically stated to survive the delivery of the deed. . ." (P. A-23/24)

The third affirmative defense in the amended answer charges that any losses incurred by appellee, resulted from its own mismanagement. (P. A-24)

The fourth affirmative defense in the amended answer charges that, pursuant to the management agreement, appellant hired one Halyna Sawyna to act as his management representative and inter alia to collect rent and render monthly reports to appellant; however, appellee enticed Halyna Sawyna to work for appellee and cease rendering reports and information to appellant, as a result of which, appellant terminated her employment, and she began working for appellee, so that, appellee, through her, assumed its own management, thereby vitiating the alleged management and guarantee agreement. (P. A-24/25)

The amended answer alleges a fifth affirmative defense and counterclaim by appellant for damages for \$25,000.00 for breaching his management agreement, by enticing Halyna Sawyna to violate her agreement with appellant. (P. A-25)

The answer was interposed for appellant by Newman, Aronson & Neumann, Esqs. However, on or about the 9th day of July, 1974, counsel for appellant moved to be relieved from the case. (P. A-59) The motion was granted on the 23rd day of July, 1974, directing appellant to either hire new counsel or enter an appearance pro se, within twenty (20) days, which appellant failed to do. (P. A-89) On or about the 19th day of September, 1974, appellant moved his residence to Marbella, Spain. (P. A-59) On or about the 16th day of September, 1974, appellee moved to strike appellant's answer and enter a judgment by default for failure to hire new counsel or appear pro se, as ordered by the Court. (P. A-86/87) Service was made upon appellant by regular mail at his new address, Avenue Ricardo Soriano 12, Marbella (Malaga), Spain. (P. A-87, A-101) The supporting affidavit of David G. Taylor, Esq., sets forth that he is

both a member of the law firm representing appellee in this action and Secretary of appellee. (P. A-88) Inter alia, he recites that the Fourth Count in the complaint charges that appellee and appellant entered into an ancillary management and guarantee agreement in connection with the sale of the office building to appellee, wherein appellant committed himself to manage the building for five (5) years and guarantee a net return of \$70,000.00, per year, commencing the 1st day of May, 1971 and through the 30th day of April, 1976. (P. A-94) The affidavit further alleges that for the year ending April 30th, 1972, there was a net operating loss of \$1,465.00, fixing the liability of appellant at \$71,465.00 for that year, that for the year ending April 30th, 1973, the building earned a net profit of \$31,176.00, fixing the liability of appellant for the year at \$38,824.00 and for the year ending April 30th, 1974, the building earned a net profit of \$31,537.00, fixing the liability of appellant for that year of \$38,463.00, for a total of \$148,753.00 liability under the guarantee. (P. A-95/96) These figures are corroborated in a supporting affidavit of Steven A. Kreigsman, a Certified Public Accountant. (P. A-98/100) However, no profit and loss statement is attached to the papers, nor any

explanation of how appellee arrives at its financial conclusions. The affidavit of David G. Taylor, goes on to recite that the aforesaid sums amount to liquidated damages, and default judgment should be entered therefore, together with the sum of \$11,940.00, allegedly converted by appellant, as set forth in count three, totalling \$160,692.00, plus interest. (P. A-96)

The affidavit of service reveals that these motion papers were served upon appellant by mailing them to him in Spain on the 16th day of September, 1974. (P. A-101) The motion was made returnable before Judge Robert J. Ward on the 24th day of September, 1974. (P. A-86) The papers were received by appellant on the 7th day of October, 1974, as appears in the telegram that appellant sent from Spain to the attorneys for appellee on that day. (P. A-102) It was too late, for appellant to hire counsel and serve papers in opposition, since Judge Ward made his decision, granting the motion, on the 8th day of October, 1974. (P. A-2) On the 10th day of October, 1974, appellee mailed appellant in Spain a copy of the proposed order and judgment with notice of settlement, to be presented to Judge Ward on the 17th day of October, 1974. (P. A-27/31) On the 17th day of October,

1974, Judge Ward signed a judgment against appellant in the sum of \$160,692.00, plus interest in the sum of \$18,224.15, for a total of \$178,916.15. (P. A-33/35) A copy of the judgment together with notice of entry and a bill of costs in the sum of \$11.75, were mailed to appellant in Spain on the 30th day of October, 1974. (P. A-36/39)

On the 30th day of October, 1974, appellee mailed to appellant in Spain a notice to take the deposition of appellant on the 18th day of November, 1974, at the office of Havens, Wandless, Stitt & Tighe, 20th floor, 99 Park Avenue, New York, New York. (P. A-40/42) When appellant failed to appear, appellee secured an order of Judge Ward, directing his appearance for examination at the Courthouse at Foley Square, New York City on the 28th day of January, 1975. (P. A-43/44) It was served upon appellant by mailing it to him to his address in Spain on the 21st day of January, 1975, just seven (7) days prior to the date set for his appearance in New York for deposition. (P. A-45)

On the 30th day of January, 1975, Judge Ward signed an order to show cause presented by appellee, why appellant should not be punished for contempt of court, returnable the 14th day of February, 1975. However, the

Court directed that these papers be served upon appellant by Registered Mail, Return Receipt Requested, on or before the 3rd day of February, 1975. (P. A-46/67) On the 31st day of January, 1975, they were mailed by appellee, directed to appellant at his address in Spain. (P. A-51) The postmark on the Return Receipt discloses that the papers were received in Spain on the 6th day of February, 1975. (P. A-52)

Having finally received notice of a proceeding in time to appear and oppose it, appellant appeared through Bernard Hirschhorn, Esq., who recited in his opposition that appellant had not received notice of deposition (or the order directing his appearance to be deposed) in time to make a timely appearance from Spain to the United States, nor was a tender made to him of the costs of transportation to finance the costly trip of thousands of miles. (P. A-53/55)

Appellant cross moved to vacate the default judgment entered against him (P. A-56/57), setting forth that at about the time the default judgment had been entered against him, he and Dr. Renatus Ruger, for whom appellee corporation is the alter ego, were involved in negotiations to settle the case. He pointed out that his original attorneys withdrew from the case because he did not have

the funds on hand to pay their fees and that the papers preceding the order to show cause and supporting papers - the only ones served upon him by Registered Mail, Return Receipt Requested - arrived at Spain too late for him to defend or respond, considering the short notice given by appellee in all of them. He then sets forth that he has a good and meritorious defense to this lawsuit, referring to the detailed recitals in the affirmative defenses of his answer that descend to particulars. (P. A-58/64)

Annexed to his moving papers is a letter appellant received from Dr. Renatus Ruger, dated October 4th, 1974, just four (4) days before the decision of Judge Ward, granting the motion of appellee to enter a default judgment against appellant, which indicates proposed terms to settle the lawsuit, reciting, in part, as follows:

"Many thanks for your letter of September 25th. I would like to restate to you and clarify that I am ready to settle our legal involvement in the U.S., as I have told you during our last meeting, conditioned the legal consent on the attorneys who are handling the legal matter of my company in the U.S., Havens, Wandless, Stitt & Tighe of New York.

At that time (of our last meeting) we have explored the various possibilities and you have consented and confirmed in writing a solution which I have found basically interesting fro my group. . ." (P. A-67)

Also annexed was a copy of a letter dated January 7th, 1975 from appellant to Judge Ward that he had no notice that a motion had been made to enter a default judgment against him and that at the time, he had been in negotiations with Dr. Ruger to settle the case. (P. A-68)

In opposition to the cross-motion, Gary P. Rosenthal, Esq., associated with counsel for appellee submitted a supplemental affidavit, reciting that the notice given at each stage of the proceedings was adequate and that there were no negotiations between the parties. He further alleged that appellant is a sophisticated litigant, having graduated from a law school in France. (P. A-72/82; A-103) Also annexed was an affidavit of Dr. Ruger, who confirmed a meeting with appellant in Spain in September, 1974, but denied that any serious settlement talks took place between the parties. (P. A-106)

POINT ONE

APPELLANT'S CONSTITUTIONAL RIGHTS SECURED BY THE FOURTEENTH AMENDMENT WERE VIOLATED BY INADEQUATE EIGHT (8) DAY NOTICE OF MOTION FOR A DEFAULT JUDGMENT SERVED UPON HIM BY REGULAR MAIL DIRECTED TO HIS ADDRESS IN SPAIN, AND WHICH HE DID NOT RECEIVE IN TIME TO PREPARE A DEFENSE.

On the 9th day of July, 1974, former counsel for

appellant moved the Court below for leave to withdraw, on grounds they had not been paid the fees due them. (P. A-59) The motion was granted on the 23rd day of July, 1974, directing appellant to either engage new counsel or file a notice of appearance to defend pro se, within twenty (20) days. (P. A-89)

Shortly thereafter, appellant took up permanent residence in Spain. (P. A-59) On the 16th day of September, 1974, appellee moved the court below to strike the answer of appellant and to enter a default judgment, on grounds that he had failed to either hire new counsel or file a proper pro se notice of appearance, mailing the papers by regular mail to appellant to his address in Spain on the 16th day of September, 1974, which were made returnable in the court below, before Judge Ward, only eight (8) days later on the 24th day of September, 1974. (P. A-86/87; A-101) The papers were not received by appellant until October 7th, 1974, two (2) weeks after the date set for the hearing before Judge Ward. He sent a telegram to the attorneys for appellee, complaining of the late notice. (P. A-102) It was too late. The following day, on October 8th, 1974, Judge Ward made his decision, granting the motion to strike appellant's answer and a default judgment to appellee in the sum of

\$178,916.15, plus costs in the sum of \$181.75. (P. A-36/39)

"The fundamental requisite of due process of law is the opportunity to be heard. . . . Such hearing must be at a meaningful time and in a meaningful manner."

Desmond v. Hachey, 315 F. Supp. 328 (D.C., Me., 1970);

Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965). In Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed. 2d 255 (1962), it was held that notice, to meet Fourth Amendment standards, must be given at a time and manner that will afford a party opportunity to defend himself. In that case, notice tacked to a tree was held to be Constitutionally insufficient. Eight (8) days notice by regular mail forwarded to Spain is just as inadequate. Indeed, the short notice afforded by counsel was clearly intended by them not to reach appellant in time for him to prepare a defense to their application to enter a judgment by default. The likelihood that such papers could reach Spain in so short a time was remote.

It is significant that the court below impliedly recognized that the notice that appellee had been giving to appellant by regular mail forwarded to Spain, with return dates fixed shortly from the date of mailing, was

inadequate and directed that the order to show cause why he should not be punished for contempt of court be served by Registered Mail, Return Receipt Requested. (P. A-46/47) However, the ~~bais~~ basis for the order to show cause was the original application by appellee for the default judgment, and that application was served by regular mail, which appellant did not contest, returnable only eight (8) days from the date of service, despite its destination in Spain.

Other factors that must be taken into consideration was that appellant in Spain, was not represented by counsel. Surely, due process of law entitled him to sufficient time, upon receiving the application, to retain counsel to interpose a defense on his behalf. Judicial notice must be taken of the fact that a letter mailed abroad to a country in Europe is not calculated to reach its destination within eight (8) days of mailing. Couple this with the fact that appellant in Spain was under a handicap, to say the least, to find a New York lawyer in Spain, the notice afforded him was patently inadequate.

What stands undisputed was that appellant received the application to enter a default judgment on October 7th, 1974, thirteen (13) days after it appeared on Judge Ward's

calendar. The following applications - the notice to take appellant's deposition and the order for appellant to be deposed - were, likewise mailed to appellant in Spain by regular mail, with return dates fixed shortly after the date of mailing, clearly calculated to prevent appellant from complying with their terms, by reason of the short notice. (P. A-40/45) It is significant that the provision to serve the order to show cause to punish for contempt upon appellant by Registered Mail, Return Receipt Requested, was directed by Judge Ward, not counsel for appellee. (P. A-46/47) It is further significant that upon receiving timely notice of the latter application, appellant did retain counsel and defend the proceeding.

An application to enter a default judgment is perhaps the most drastic proceeding that can be initiated in a lawsuit. Its effect is to deprive a party of his right to defend himself. Such judgment should not be granted, unless the Court satisfied itself that the party has received notice of the application. The fact that appellant resided in Spain required that extra measures be taken to assure that he receive notice of the application, in ample time to prepare a defense. It is submitted that

Judge Ward should have denied the motion, without prejudice to a new application by way of order to show cause by Registered Mail, Return Receipt Requested, to satisfy the Court that notice be served in a manner to assure the Court that it reached appellant in time.

The manner of serving the notice of motion papers to enter a default judgment - by regular mail - and the return date of only eight (8) days from the date of mailing assured counsel for appellee that appellant would not have sufficient notice to defend. Such underhand and sharp practice should not be tolerated. Irrespective of the time required by the Federal Rules of Civil Procedure for service of papers, appellee was chargeable with notice that the manner selected by it was unlikely to furnish appellant with notice in time.

Rule 55(c), Federal Rules of Civil Procedure authorizes a Court to set aside a judgment by default:

"For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b)."

Rule 60 (b) provides:

"On motion and upon such terms as are just, the court may relieve a party of his legal

representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment."

The neglect of appellant in failing to contest the motion for a default judgment was "excusable". It resulted from the "fraud . . . or other misconduct of an adverse party", in serving token notice upon appellant of its application, that was deliberately calculated to reach appellant late. The Court below should have exercised its discretion and vacated the judgment under the circumstances.

It is of additional significance to note that David G. Taylor, Esq., a member of the firm representing appellee, is an officer of appellee corporation. (P. A-88) Such self-interest can tend to explain the sharp practice employed herein, in making service.

Common sense suggests that the service in the case at bar was not calculated to furnish appellant with notice, but just to go through the statutory motions to give dignity to a scheme to deprive appellant of his day in court. Under the circumstances, the judgment by default should have

been vacated by the Court below for failure to furnish adequate notice of application under the circumstances.

POINT TWO

APPELLANT HAS A MERITORIOUS DEFENSE TO THE ACTION BY APPELLEE AND THE COURT BELOW SHOULD HAVE VACATED THE JUDGMENT ENTERED BY DEFAULT

The record shows that appellant had a valid reason for failing to defend the motion by appellee for a default judgment, returnable the 24th day of September, 1974. (P. A-86) He did not receive the papers in Spain, to where they were sent, until the 7th day of October, 1974, thirteen (13) days after the hearing date. (P. A-102)

The papers submitted by appellee in support of the motion for a default judgment consisted of affidavits by David G. Taylor, Esq., a member of the law firm representing appellee, as well as an officer in appellee corporation, and Steven A. Kreigsman, Esq., a certified public accountant, that are conclusory in nature. They allege that appellant and appellee entered into a management and guarantee agreement, whereby appellant committed himself to both manage the office building that is the subject of the lawsuit, and to guarantee net income of \$70,000.00 annually for five (5) years. The affiants allege that the first year, the build-

ing lost \$1,465.00, the second year the building earned \$31,176.00 and the third year it earned \$31,537.00. Based on these figures, it is their contention that there is due and owing a total of \$148,753.00 from appellant, pursuant to his guarantee. No profit and loss statement is submitted with the affidavit, nor any explanation how these figures are calculated. Indeed, all the Court had to reply upon was the self-serving declarations of a law firm that took pains to make certain appellant be not in a position to defend himself. There is no explanation as to the methods of depreciation used to arrive at the final figure, nor any hint as to what items were deducted as expenses. Under the circumstances, the denial by appellant that the damages claimed by appellee are correct and his further contention that the figures are padded to show a less profitable situation, both for income tax evasion and in order to harass appellant, are sufficient to raise a meritorious defense on behalf of appellant.

It is submitted that the court below should not have allowed the entry of a default judgment, without putting appellee to the task of presenting a profit and loss statement and an explanation as to its method of depreciation,

as well as a detailed explanation of the expenses deducted, to reach the figures it did.

Furthermore, the answer of appellant sets forth an additional affirmative defense as follows:

"23. Pursuant to an agreement between plaintiff and defendant, dated May 1, 1971, whereby defendant was retained by plaintiff to manage the "Center Square Building" and defendant was permitted to hire in his own name all managerial personnel necessary for the efficient discharge of his duties, the defendant in or about May 1, 1971 entered into an agreement with one HALYNA SAWYNA, whereby the said HALYNA SAWYNA, among other things included the collection of rent for the account of the plaintiff and the rendering of monthly reports and statements to the defendant.

24. Upon information and belief, in or about July, 1971 plaintiff with knowledge of the employment of the said HALYNA SAWYNA by the defendant, wilfully enticed procured the said HALYNA SAWYNA to leave the employment of the defendant and thereafter commenced the employment of the said HALYNA SAWYNA as the agent of the plaintiff and instructed her, among other things, to cease rendering reports and statements to the defendant and to no longer provide the defendant with any other information concerning the management of the said premises.

25. Defendant thereafter being advised thereby by the said HALYNA SAWYNA terminated his employment of her.

26. By reason of the foregoing and the complete control of the actions of the said HALYNA SAWYNA by the plaintiff, plaintiff commenced to operate, manage and control the said premises through HALYNA SAWYNA whom plaintiff made its own agent and/or employee and defendant was prevented from performing

his obligations under the said agreement.
27. Any sums of money collected as rent
by the said HALYNA SAWYNA was therefor
collected by her as an agent or employee
of the plaintiff." (P. A-24/25)

Appellant's papers show that he has a good and meritorious defense to the management and guarantee agreement, to wit: that it was breached by appellee. Therefore, irrespective of the accuracy of appellee's figures, appellant had no obligation thereunder.

The default judgment in the court below also charges appellant with withholding rentals in the sum of \$11,940.00, as charged in the third count of the complaint, (P. A-96), which appellant denies. Not a scintilla of proof was offered by appellee that this claim has any merit, not even by presentation to the court below of any account stated.

"A motion for judgment by default is addressed to the sound discretion of the court . . . In the exercise of that discretion, courts have preferred a trial on the merits to a judgment by default when material issues of fact are involved . . . Any doubt should be decided against allowing a default where there is alleged a meritorious defense and substantial amounts are involved." United States ex rel Mercer v. Kelly, 50 F.R.D. 150 (D.C.E.D. Pa., 1970).

"Defaults are not favored by the law. Any doubt should be resolved in favor of setting aside a default so that a determination may be made on the merits of the case."

Securities & Exchange Commission v. Vogel, 49 F.R. 297 (D.C.S.D.N.Y., 1969). Courts are "Reluctant to enter a default judgment" where there is no "apparent prejudice to plaintiff." Wallace v. DeWard, 47 F.R.D. 4 (D.C., Virgin Islands, 1969).

Brushing aside the failure to meet Constitutional requirements of adequate notice of motion for a default judgment, appellant has shown "good reason for the default" and has descended to particulars to show a "meritorious defense", while appellee has never offered any documentation, other than its self serving conclusions, that it has a valid cause of action. The judgment by default should be opened. Gomes v. Williams, 420 F. 2d 1364 (10th Cir., 1970).

POINT THREE

APPELLANT'S CONSTITUTIONAL RIGHTS SECURED BY THE FOURTEENTH AMENDMENT WERE VIOLATED BY INADEQUATE NOTICE OF DEPOSITION AND ORDER TO TAKE DEPOSITION SERVED BY REGULAR MAIL AT HIS ADDRESS IN SPAIN, AND WHICH HE DID NOT RECEIVE IN TIME TO PREPARE A DEFENSE.

Counsel for appellant systematically set out to

posture appellant for a contempt citation by serving him with notice of deposition and order to take his deposition, with notice calculated not to be received in time, or for that matter, at all.

On the 30th day of October, 1974, appellee served upon appellant a notice to take his deposition on the 18th day of November, 1974, at the Park Avenue offices of appellee in Manhattan. The notice was mailed to appellant at his address in Spain, regular mail, not Registered Mail, to assure he would receive it. (P. A-40/41) When appellant failed to appear for the examination, appellee secured an order from Judge Ward directing his appearance for examination at the Courthouse on the 28th day of January, 1975. The order was mailed by appellee to appellant in Spain on the 21st day of January, 1975, just seven (7) days prior to the date set for his appearance in New York for the deposition. (P. A-43/45)

The short notice given appellant of the court order requiring his presence for a deposition assured that he would be in default. It was unlikely that regular mail would reach him in time for him to comply. Indeed, the record in this case reveals that it takes six (6) days for

a Registered Mail letter to be delivered in Spain. (P. A-51/52) It cannot be that regular mail does not take longer.

The failure to serve adequate notice in time for a party to respond, vitiates the proceeding. Desmond v. Hachey, 315 F. Supp. 328 (D.C., Me., 1970); Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965); Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L. Ed. 2d 255 (1962).

The notice of the order requiring appellant to appear for a deposition was not served in sufficient time likely to give him opportunity to comply. Therefore, there is no basis to hold him in contempt of court and the order of the court below requiring him to appear for such deposition to purge himself, should be reversed.

POINT FOUR

DUE PROCESS OF LAW IS VIOLATE. BY ORDERING A PARTY TO TRAVEL FROM SPAIN TO NEW YORK FOR A DEPOSITION WITHOUT TENDERING TRAVEL EXPENSES TO HIM.

It is axiomatic that a person or party cannot be held in contempt of court, without proof that he is wilfully disobedient to a court order. Appellee served appellant with notice to appear at the office of appellee's attorneys

in New York, without tendering him the transportation expenses required for such appearance. This Court can take judicial notice that air fare between Spain and New York amounts to hundreds of dollars, not taking into account hotel and other kindred expenses. It is unreasonable to expect a party to assume such financial outlay. It is presumptuous to assume that such sum of money is at his disposal.

28 U.S.C. 1783 (a) provides that "(a) a court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country . . . and in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance." The statute goes on to recite that, "(b) . . . the person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena."

Rule 30 (a) of the Federal Rules of Civil Procedure, on which appellee relied for service of the notice of deposition to aid in enforcement of its judgment, contains no procedure for service upon a party abroad. It is submitted that 28 U.S.C. 1783 should be read into Rule 30 (a). Without such tender, there cannot be a basis for a finding of contempt of court. Contempt is a wilful disobedience to a court mandate. Where an outlay of substantial sums of money is necessary to comply, contempt will not lie without proof that the party had sufficient funds. It is submitted further that it would be unreasonable to expect a party, even with funds, to assume the financial responsibility of such trip that can only be of benefit to his adversary. Unless a party makes a showing that he tendered traveling expenses to the party ordered to appear from abroad, there is no basis for a finding that he wilfully disobeyed a Court mandate, the sine qua non for a contempt finding.

The failure to tender travel expenses to appellant to make the trans Atlantic flight stands as an inexorable barrier to a contempt finding.

Finally, it is submitted that appellee is not

without remedy. Certainly, before restoring to the drastic remedy of oral examination of a resident of Spain in New York, appellee should avail himself of opportunity to send appellant written interrogatories. Rule 31 of the Federal Rules of Civil Procedure. The order of the Court below directing appellant to appear in New York from Spain, without tendering travel expenses, should be reversed.

CONCLUSION

THE ORDERS OF THE COURT BELOW SHOULD
BE REVERSED AND THE JUDGMENT ENTERED
AGAINST APPELLANT BY DEFAULT BE
REVERSED.

Respectfully submitted,

BERNARD HIRSCHHORN
Attorney for Appellant
Office & P.O. Address
108-18 Queens Boulevard
Forest Hills, New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff-Appellee,

- against -

E. RENE FRANK,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK

SS.:

I, **James A. Steele** being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N.Y.

That on the ~~22~~ ^{8th} day of October 1975 at **99 Park Ave, N.Y., N.Y.**

deponent served the annexed Brin upon

Havens Wandless Stitt & Tighe

the **Attorneys** in this action by delivering ² a true copy ^{ss} thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 8th
day of October 1975

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977